Everest Scaffolding, Inc. v Flag Waterproofing & Restoration, Co., Inc.
2015 NY Slip Op 31203(U)
July 8, 2015
Supreme Court, New York County
Docket Number: 161353/2014
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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EVEREST SCAFFOLDING, INC.,

Plaintiff,

Index No.
161353/2014

DECISION and ORDER

- against -

Mot. Seq. 001

FLAG WATERPROOFING & RESTORATION, CO., INC. and ANTHONY COLOA, JR.,

Defendants.

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HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff, Everest Scaffolding, Inc. ("Plaintiff" or "Everest"), brings this action for breach of contract, account stated and *quantum meruit* to recover $50,220.76 allegedly owed for work, labor, and materials allegedly provided to defendants, Flag Waterproofing & Restoration, Co., Inc. ("Flag") and Anthony Coloa, Jr. ("Coloa") (collectively, "Defendants"), pursuant to six written agreements (collectively, the "Contracts") to provide scaffolding in connection with Flag's waterproofing and restoration of various properties in New York (the "Properties"). Plaintiff claims to have issued several invoices to Defendants for Plaintiff's work, labor and scaffolding materials, pursuant to the Contracts, and that the amount of $50,220.76 remains due and owing from Defendants thereunder.

Plaintiff commenced this action on November 14, 2014, by summons and complaint.

Plaintiff now moves for an Order, pursuant to CPLR § 3215, granting judgment on default in favor of Plaintiff and against Defendants in the sum of $50,220.76. In support, Plaintiff submits: the affidavit of Christopher J. Downes, Plaintiff's president, dated January 7, 2015; copies of the Contracts; copies of

Invoices issued to Defendants (the "Invoices"); Plaintiff's summons and complaint; the affidavit of service of Plaintiff's initiatory papers upon Flag by personal delivery to an authorized agent, dated December 1, 2014; the affidavit of service of Plaintiff's initiatory papers upon Coloa by personal delivery to a person of suitable age and discretion and subsequent mailing, dated December 1, 2014; and, the affidavit of additional mailing upon Coloa, pursuant to CPLR § 3215(g).

Defendants cross-move for an Order, pursuant to CPLR 3211(a)(1), (5) and (7), dismissing the Plaintiff's complaint in its entirety as against Coloa and dismissing all claims based upon invoices dated before November 14, 2010, on the basis of documentary evidence, statute of limitations, and failure to state a claim. In support, Defendants submit the attorney affirmation of Mathew S. Didora ("Didora"); a copy of the printout from the New York Secretary of State's website for "Flag Waterproofing and Restoration Co. Inc." which was dissolved by proclamation on December 31, 2003; a copy of Defendant's certificate of incorporation and certificate of assumed name; copies of a sample of contracts between Everest, as subcontractor, and "SATO CONSTRUCTION CO INC. DBA FLAG WATERPROOFING & RESTORATION CO," as contractor; and, copies of several invoices.

CPLR § 3215 provides, in relevant part: "[o]n any application for judgment by default, the applicant shall file proof ... of the facts constituting the claim, the default and the amount due by affidavit made by the party." (CPLR § 3215[f]). CPLR § 3215 does not contemplate that default judgments are to be "rubberstamped" once jurisdiction and a failure to appear have been shown. (*Feffer v. Malpeso*, 210 A.D.2d 60, 61 [1st Dep't 1994]; *see also Gagen v. Kipany Prods.*, 289 A.D. 2d 844, 846 [3d Dep't, 2001] ["[T]he granting of a default judgment does not become a 'mandatory ministerial duty' upon a defendant's default."]). Rather, some proof of liability is required to satisfy the court as to the prima facie validity of the uncontested cause of action. (*Feffer*, 210 A.D.2d at 61). The standard of proof on an application for judgment by default "is not stringent, amounting only to some firsthand confirmation of the facts". (*Id.*).

Plaintiff's complaint, which is verified by counsel, alleges that, "Between 2006 and 2010, Plaintiff submitted six (6) written agreements (collectively the "Contracts") to Flag to provide scaffolding in connection with Flag's waterproofing and restoration of the following properties:

a. 60 Gramercy North, New York, NY;

b. 17 West 54th Street and 24 West 55th Street, New York, NY;

c. 555 Edgecombe Avenue, New York, NY;

d. 504 West 11 0th Street, New York, NY;
e. 230 West Broadway, New York, NY;

f. 333 West 34th Street, New York, NY; and

g. 36 Hamilton Avenue, Bronx, NY (collectively the "Properties").

(Compl. ¶ 5). Plaintiff's complaint further alleges, "Thereafter and pursuant to the Contracts Plaintiff sent over one hundred (100) invoices to defendants for work performed, materials furnished and scaffolding rental fees for the Properties (collectively the 'Invoices')." (Compl. ¶ 6). Plaintiff's complaint alleges that, "[t]he Contracts were agreed to by Flag", that, "the scaffolding was duly installed at the Properties and later fully removed", and that, "[p]ursuant to the Contracts, Plaintiff sent defendants the Invoices, which were received by defendants, indicating the amount due on the individual Properties." (Compl. ¶¶ 9-11). Plaintiff's complaint asserts that Defendants received the Invoices without objection, and that "Flag has failed to pay Plaintiff the total amount due pursuant to the Contracts and Invoices in the sum of $50,220.76, which remains due and outstanding." (Compl. ¶¶ 12-13).

In the affidavit of Downes, Downes avers: "Between 2006 and 2010, Plaintiff submitted six (6) written agreements to Flag to provide scaffolding in connection with defendant Flag Waterproofing & Restoration, Co., Inc.'s ('Flag') waterproofing and restoration of various properties." (Downes Aff. ¶ 2). Downes further avers: "Thereafter, Plaintiff sent over one hundred (100) invoices to defendants for work performed, materials furnished and scaffolding rental fees for the various properties." (Downes Aff. ¶ 3). Downes avers that, "the invoices were received by defendants, indicating a total amount outstanding and due to Plaintiff in the sum of $50,220.76." (Downes Aff. ¶ 4). Downes further avers that "the invoices were retained by defendants, without objection", that, "[d]espite due demand, Flag made only partial payment on the contracts and invoices", and that, "Defendants have failed to pay the balance of the amounts due and owing in the amount of $50,220.76." (Downes Aff. ¶¶ 5-7).

Accordingly, Plaintiff meets its burden of demonstrating sufficient "first-hand confirmation" of the facts to support the entry of a default judgment as against Flag.

However, with respect to individual defendant Coloa, a party may not use a complaint that is verified by counsel as the "affidavit of facts constituting the claim" for purposes of CPLR § 3215 unless counsel has direct personal knowledge of the facts constituting Plaintiff's claim. (*Joosten v. Gale*, 129 A.D.2d 531, 534 [1st Dep't 1987] [observing that, "a complaint verified by an attorney, although permissible under CPLR § 3020(d)(3) where . . . the client is not in the county where the attorney maintains his office, is insufficient for purposes of [CPLR § 3215(f)] when the attorney lacks personal knowledge of the facts constituting the claim.")]. Where the complaint is verified by counsel, unless counsel has direct personal knowledge of the facts constituting Plaintiff's claim, the verified complaint, "is purely hearsay, devoid of evidentiary value, and thus insufficient to support entry of a judgment pursuant to CPLR § 3215." (*Beltre v. Babu*, 32 A.D.3d 722, 723 [1st Dep't 2006]). Additionally, it is the general rule that a corporate officer is not liable for contracts entered into on the corporation's behalf unless there is "clear and explicit evidence" of the individual officer's intention to be personally bound. (*Mencher v. Weiss*, 306 N.Y. 1, 4, 114 N.E.2d 177 [1953]).

Here, Plaintiff's complaint, which is verified by counsel, alleges that Coloa is Flag's president, and that, "[b]y virtue of Flag's dissolution in 2003, defendant Anthony Coloa, Jr. as Flag's President is personally responsible for Flag's breaches." (Compl. ¶ 19). Plaintiff does not provide documentation or testimonial evidence demonstrating the prima facie liability of Coloa personally. The affidavit of Downes does not assert any agreement with Coloa in his individual capacity or state any other basis to impose Flag's obligations upon Coloa personally. The Contacts refer to Flag as Plaintiff's customer and contain no indication that Coloa intended to be personally bound thereunder. The Invoices are billed to Flag. Accordingly, Plaintiff fails to demonstrate sufficient "first-hand confirmation" of the facts to satisfy the Court as to the prima facie validity of Plaintiff's claims against Coloa individually and Plaintiff's application for a judgment by default as against individual defendant Coloa fails.

Turning now to Defendants' cross motion, pursuant to CPLR § 3012(d), "[u]pon the application of a party, the court may extend the time to appear or plead, or compel the acceptance of a pleading untimely served, upon such terms as may be just and upon a showing of reasonable excuse for delay or default." (CPLR §

3012[d]). In order to be permitted to serve an untimely answer as timely, a defendant must provide a reasonable excuse for the delay and demonstrate potentially meritorious defenses to the action. (*Pagan v. Four Thirty Realty LLC*, 50 A.D. 3d 265, 266 [1st Dep't 2008]). Additionally, "[a]s a matter of general policy, disposition of controversies on the merits is favored." (*Warbett v. Polokoff*, 250 N.Y.S.2d 633, 634 [1st Dep't 1964]).

Here, Defendants argue that Flag's default should be excused due to settlement negotiations between the parties. Defendants' delay was relatively short and Plaintiff has not demonstrated that it was prejudiced thereby. Coupled with a meritorious defense as to individual defendant's personal liability and regarding the timeliness of certain of Plaintiff's claims, under these circumstances, permission to serve a late answer to Plaintiff's complaint is warranted.

Wherefore, it is hereby,

ORDERED that Plaintiff's motion for default judgment is denied; and it is further

ORDERED that Defendants' cross-motion is granted only to the extent that Defendants are directed to file an answer to Plaintiff's complaint within 20 days of service of a copy of this Order with Notice of Entry.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

DATED: July 8, 2015

EILEEN A. RAKOWER, J.S.C.